

¹ The hearing was labeled a motion hearing but the parties agreed it was a continuation of the preliminary hearing and back before the ALJ pursuant to her July 7, 2010 Order requiring further consideration before surgical intervention.

and had the opportunity to present additional evidence, if necessary. On June 23, 2011, an additional hearing was held with additional evidence provided.

After considering the additional evidence, the ALJ granted claimant's request for additional medical treatment and designated Dr. Alan Moskowitz as the authorized treating physician to provide medical treatment including surgery.

Respondent requests review of whether claimant's accidental injury arose out of and in the course of employment. Respondent argues that the claimant's back condition did not arise out of and in the course of her employment.

Claimant argues the Board does not have jurisdiction to review this matter and therefore respondent's application should be dismissed. In the alternative, claimant argues the ALJ's Order should be affirmed.

The issues raised on this appeal are:

1. Does the Board have jurisdiction to review the June 24, 2011 Order?
2. If so, did claimant prove her present need for medical treatment is the result of her December 1, 2009 accidental injury that she suffered while working for respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The first issue that must be addressed is whether the Board has jurisdiction to review the ALJ's preliminary hearing Order. Generally, issues concerning medical treatment, including whether claimant is in need of additional treatment and, if so, whether the treatment ordered by the ALJ is appropriate, are questions within the ALJ's jurisdiction to decide and are not reviewable by the Board on appeal from a preliminary hearing order. However, whether claimant's lumbar spine condition and need for surgery was directly attributable to the December 1, 2009, accident is an issue the Board may review on an appeal from a preliminary hearing decision because it gives rise to the jurisdictional issue of whether her injury and need for treatment arose out of and in the course of her employment with respondent.²

Claimant had worked in long-term care for respondent about a year before her accidental injury. On December 1, 2009, claimant was transferring a patient from his bed

² See K.S.A. 44-534a(a)(2) and K.S.A. 44-551(b)(2)(A).

to a shower chair. Claimant testified that her upper torso twisted but her lower body did not. When claimant initially saw Dr. Travis Hubin on December 4, 2009, his medical record indicated claimant complained of right knee and lower back pain.³

Dr. Hubin's treatment focused on claimant's right knee. As a result of a disagreement between claimant and Dr. Hubin, claimant was referred to Dr. Christopher Siwek, an orthopedic surgeon. Although claimant continued to complain of knee and pain into the right foot, Dr. Siwek concluded her pain was a result of low back pathology and irritation of the nerve root. Dr. Siwek ordered an MRI of claimant's back. An MRI taken on March 2, 2010, revealed desiccation of the disks from L-3 to S-1; a posterior annular tear at L4-5 with a moderate disk bulge to the left at that level; and a moderate disk protrusion at L3-4 extending slightly below the disk space with possible encroachment on both nerves. In March 2010, claimant received a series of epidural injections given by Dr. Milton Landers. The epidural injections only provided temporary relief.

As previously noted, the ALJ entered on Order on July 7, 2010, which provided:

Paul Stein, M.D., authorized to provide conservative care including diagnostic testing. Any further referral for surgical intervention to be reviewed by the court.⁴

Dr. Stein examined and evaluated claimant on August 2, 2010. The doctor recommended lumbar epidural injections which again only provided claimant temporary relief. Dr. Stein ordered nerve conduction studies on claimant's legs and then ultimately a discography was performed by Dr. David Sollo. The discogram revealed pain at the L3-4, L4-5 and L5-S1 levels. Dr. Stein did not find any complaints of low back pain in Drs. Hubin and Siwek's records. Dr. Stein diagnosed claimant with a lumbar strain. Claimant's last visit with Dr. Stein was on November 15, 2010, and claimant was referred to Dr. Alan Moskowitz for a surgical opinion.

Claimant saw Dr. Moskowitz on two occasions. The first examination was December 9, 2010. Dr. Moskowitz diagnosed claimant with degenerative disk disease at levels from L3 to S1. Treatment options included additional epidural injections or a surgical spinal fusion. When claimant returned to Dr. Moskowitz on January 6, 2011, she determined that she wished to have the surgery due to her ongoing back pain.

At respondent's request, claimant was examined by Dr. John Estivo. Upon physical examination, Dr. Estivo diagnosed claimant has having a lumbar spine strain related to the injury of 12/1/09; age-related preexisting degenerative disk disease at L3-4, L4-5, and L5-S1; resolved right knee strain; and, a history of medically treated depression. Dr. Estivo opined that claimant should not have the lumbar fusion surgery. The doctor recommended

³ M.H. Trans., (Jun. 23, 2011) Cl. Ex. 3.

⁴ M.H. Trans., (Mar. 1, 2011) Cl. Ex. 1.

physical therapy to her lumbar spine three times a week for one month. After reaching maximum medical improvement, Dr. Estivo also recommended a Functional Capacity Evaluation (FCE) in order to determine claimant's permanent restrictions. Temporary restrictions of no lifting greater than 20 pounds and no constant bending or twisting until permanent restrictions have been determined.

Dr. Stein offered an opinion regarding the causation of claimant's back problems. In a medical report dated March 7, 2011, Dr. Stein noted in pertinent part:

The history given by the patient is that she injured her back and had lower back symptomatology on or about 12/1/09 at the same time that she had an injury to the knee. She has preexisting degenerative disk disease but no history of significant preexisting symptomatology or prior treatment requirements. Assuming the accuracy of the history given by the patient, it is more likely than not that the lumbar degenerative disk disease was aggravated and accelerated by the work incident on 12/1/09.⁵

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.⁶ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.⁷

Claimant complained of back pain from her injury at her first medical appointment with Dr. Hubin. Treatment then focused on her knee complaints but later turned to her back after Dr. Siwek concluded her leg pain was probably referred from the back. An MRI revealed disk protrusion and epidural injections were administered. Dr. Stein concluded claimant's work-related accident aggravated her preexisting degenerative disk condition and even Dr. Estivo attributed a back strain to the work-related incident. This Board Member concludes claimant has met her burden of proof to establish that her current back condition is the result of her work-related accidental injury on December 1, 2009.

The questions of what treatment the claimant needs or whether surgery is appropriate are not jurisdictional issues for Board review from a preliminary order. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment and the payment of medical compensation. The preliminary hearing statute found at K.S.A. 44-534a gives the ALJ authority to grant or deny the request for medical

⁵ M.H. Trans., (Jun. 23, 2011), Cl. Ex. 2.

⁶ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁷ *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

compensation pending a full hearing on the claim. Thus, the ALJ did not exceed her jurisdiction and the Board does not have jurisdiction to review the ALJ's preliminary findings regarding medical compensation.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁹

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 24, 2011, is affirmed.

IT IS SO ORDERED.

Dated this 31st day of August, 2011.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Charles W. Hess, Attorney for Claimant
William L. Townsley, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

⁸ K.S.A. 44-534a.

⁹ K.S.A. 2010 Supp. 44-555c(k).